

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Application of)	
)	
Diponti Communications, LLC)	Facility ID No. 26347
)	NAL/Acct. No. MB-202141410047
For Renewal of License and)	FRN: 0028981561
Special Temporary Authority for)	Application File Nos. 0000121418
W276DF, Westerly, RI)	BELSTA-20210326AAB
(formerly W228AU, North Bennington, Vermont))	

**MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

Adopted: September 20, 2021

Released: September 21, 2021

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. The Media Bureau (Bureau) has before it the application (Application)¹ of Diponti Communications, LLC (Diponti) for renewal of its license for FM Translator Station W276DF, Westerly, RI (Station)² and a request for extension of Special Temporary Authority (STA) to operate.³ In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture (NAL)*,⁴ we find that Diponti apparently willfully violated section 73.3539 of the Rules⁵ by failing to timely file a license renewal application and apparently willfully and repeatedly violated Section 301 of the Act⁶ by engaging in unauthorized operation of the Station after its license had expired. Based upon our review of the facts and circumstances before us, we conclude that Diponti is apparently liable for a monetary forfeiture in the amount of seven thousand dollars (\$7,000).

II. BACKGROUND

2. Section 73.3539(a) of the Rules requires that applications for renewal of license for broadcast stations must be filed “not later than the first day of the fourth full calendar month prior to the expiration date of the license sought to be renewed.”⁷ If a station has not filed a timely application for license renewal it has no authority to continue operating past the expiration date unless it requests and

¹ Application File No. 0000122059 (rec. Sept. 11, 2020).

² Before Diponti acquired the Station, it operated on a different channel and served a different community under the call sign W228AU, North Bennington, Vermont.

³ Application File No. BELSTA-20210326AAB (rec. Mar. 26, 2021) (STA Request).

⁴ This *NAL* is issued pursuant to sections 309(k) and 503(b) of the Communications Act of 1934, as amended (Act), and section 1.80 of the FCC’s rules (Rules). *See* 47 U.S.C. §§ 309(k), 503(b); 47 CFR § 1.80. The Bureau has delegated authority to issue the *NAL* under section 0.283 of the Rules. *See* 47 CFR § 0.283.

⁵ *See* 47 CFR § 73.3539.

⁶ *See* 47 U.S.C. § 301.

⁷ 47 CFR § 73.3539(a).

obtains STA.⁸ Although the Commission will process late-filed applications for license renewal to provide stations with the opportunity to rectify the situation and to avoid disruption of service to the public, the Commission generally takes appropriate enforcement action, such as monetary forfeitures, in response to the licensee's resulting rule violations.⁹

3. In this case, the Station's license expired significantly earlier than other Rhode Island stations because the prior licensee had received a short-term license renewal grant.¹⁰ Specifically, the Station's original licensee, Brian Dodge d/b/a Harvest Broadcasting Association (Harvest), entered into a Consent Decree with the Bureau in October 2016 to resolve numerous qualifications-related issues.¹¹ Under the terms of the Consent Decree, the Station was among a group of "retained stations" that Harvest was permitted to keep (or sell) but that received a conditional, one-year short-term renewal of license so that the Bureau could evaluate the Station's performance in light of past problems.¹² On November 3, 2016, Harvest and Diponti filed an application for consent to assign the license from the former to the latter. The Bureau renewed the Station's license on November 8, 2016, with a short-term expiration date of November 8, 2017. On November 15, 2016, the Bureau granted Harvest's application for a permit to relocate the Station from Vermont to Rhode Island so it could rebroadcast Diponti's station WBLQ(AM), Westerly, Rhode Island, pursuant to AM revitalization policies. The Bureau approved the license assignment from Harvest to Diponti on January 17, 2017, and the parties consummated the transaction on March 8, 2017.¹³

4. Diponti should have filed an application to renew the Station's license by July 1, 2017, the first day of the fourth full calendar month prior to the Station's license expiration date of November 8, 2017. Diponti did not file the Application until September 11, 2020 and did not request STA until September 16, 2020, almost three years after the Station's license expired. Diponti acknowledges that the Application is late but states that it did not realize that its license had expired due to the short-term renewal.¹⁴ On September 16, 2020, Diponti sought STA for the Station to remain operational while the Commission processed the Application.¹⁵ The Bureau granted STA on October 2, 2020 for a six-month

⁸ See *Atlantic City Bd. Of Educ.*, Memorandum Opinion and Order, 31 FCC Rcd 9380, 9385, para. 11 (2016) (*Atlantic City*); see also 47 CFR § 1.62 (authorizing continued operations after expiration only "where there is pending before the Commission at the time of expiration of license any proper and timely application for renewal of license").

⁹ See *Atlantic City*, 31 FCC Rcd at 9384-85, para. 10.

¹⁰ Radio stations in Rhode Island (and also Vermont) that received full-term, eight-year renewals in the last renewal cycle will file by a state-wide renewal application date of December 1, 2021, four months ahead of a state-wide April 1, 2022 expiration date. See 47 CFR. § 73.1020.

¹¹ See *Harvest Broad., et al.*, Order, 31 FCC Rcd 11840 (MB 2016) (adopting consent decree and providing for short-term renewal of the Station's license upon satisfaction of certain conditions).

¹² *Id.* at 11852, para. 28(b).

¹³ Application File No. BALFT-20161103AAW (granted Jan. 17, 2017, consummated Mar. 8, 2017).

¹⁴ See Exhibit.pdf. attached to Application ("During a routine database check of this licensee, it was realized that prior to such time as the licensee acquired the license for W276DF (formerly W228AU), a short-term renewal of license was granted with respect to this facility. Therefore, this application for renewal of license is filed late. Since acquisition of the station, the licensee has been in full compliance with all Commission rules and regulations. It is respectfully [requested] that this application for renewal of license be granted, to allow the station to resume on the normal renewal cycle for Rhode Island stations.").

¹⁵ Application File No. BLSTA-20200916ABT (rec. Sept. 16, 2020).

period.¹⁶ Diponti timely sought extension of the STA in the March 26, 2021 STA Request, which remains pending.¹⁷

5. In a July 2021 e-mail exchange about the Application's status, counsel argued that the Application is uncontested and that grant would be consistent with a policy enunciated in the *Atlantic City* case, to process late-filed renewal applications and not to consider such matters fatal.¹⁸ Counsel also notified the Bureau of a discrepancy between the license expiration date established pursuant to the Consent Decree (November 8, 2017) and that listed in the Commission's Licensing Management System (LMS) database (April 1, 2022).¹⁹

III. DISCUSSION

6. We agree with Counsel that, pursuant to the policy enunciated in *Atlantic City*, the Application's late-filing does not prevent its grant. As also noted in *Atlantic City*, however, enforcement action may be appropriate in conjunction with an untimely license renewal application, and we propose a forfeiture for the violations in the instant proceeding.

7. *Proposed Forfeiture.* This NAL is issued pursuant to section 503(b)(1)(B) of the Act. Under that provision, a person who is found to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.²⁰ Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.²¹ The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act,²² and the Commission has so interpreted the term in the section 503(b) context.²³ Section 312(f)(2) of the Act provides that "[t]he term 'repeated,' when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."²⁴

8. The Commission's Forfeiture Policy Statement and section 1.80(b)(10) of the Rules establish a base forfeiture amount of \$3,000 for the failure to timely file a required form.²⁵ The guidelines also specify a base forfeiture amount of \$10,000 for construction and/or operation without an instrument

¹⁶ See *Diponti Communications, LLC*, Letter Order, Application File No. BLSTA-20200916ABT (MB Oct. 2, 2020).

¹⁷ See File No. BELSTA-20210326AAB (rec. Mar. 26, 2021).

¹⁸ See E-mail from Dan J. Alpert, Esq. to Victoria McCauley, Attorney, FCC (July 8, 2021 12:33 AM) (July E-mail), citing *Atlantic City*, 31 FCC Rcd at 9383-85.

¹⁹ According to counsel, "[d]uring a routine database check of the licensee, it was realized last year (by me) that the 'license expiration date,' although showing in LMS as '4/1/2022' in LMS did not match with the date of the Order. Despite the date in LMS, the renewal application immediately was filed in an abundance of caution. An STA also was filed (and granted) in an abundance of caution to allow the station validly to continue to operate." See July E-mail.

²⁰ 47 U.S.C. § 503(b)(1)(B). See also 47 CFR § 1.80(a)(1).

²¹ 47 U.S.C. § 312(f)(1).

²² See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

²³ See *Southern California Broad. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991) (*Southern California*), recon. denied, 7 FCC Rcd 3454 (1992).

²⁴ 47 U.S.C. § 312(f)(2).

²⁵ See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) (*Forfeiture Policy Statement*), recon. denied, 15 FCC Rcd 303 (1999); 47 CFR § 1.80(b)(10), Table I.

of authorization for the service.²⁶ In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated in section 503(b)(2)(E) of the Act, including “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”²⁷

9. In this case, Diponti failed to file a timely license renewal application for the Station, as required by section 73.3539(a) of the Rules and violated Section 301 of the Act by continuing Station operations after the Station’s license expired. The period of unauthorized operations was considerable, running almost three years from November 8, 2017 (license expiration) until October 2, 2020 (STA grant). While Diponti indicates that its failure to file the Application timely was an oversight that did not become apparent until its counsel’s routine review of the Commission’s database, we note that “‘inadvertence,’ . . . is at best, ignorance of the law, which the Commission does not consider a mitigating circumstance.”²⁸ Nor do we consider the discrepancy of expiration dates in the Consent Decree and in LMS to be a mitigating factor because the LMS database that did not come on line until April 2019, about 21 months after the filing due date and 17 months after license expiration. Thus, Diponti does not (and could not) establish any causal connection between the LMS discrepancy and its violations. Further, because the Consent Decree was released in October 2016 and Diponti applied to acquire the Station shortly thereafter in November 2016, it should have been on notice of the one-year short term renewal as part of its due diligence. Nevertheless, we note that because Diponti had been licensed to operate the Station prior to expiration, its unauthorized operation is not comparable to “pirate” radio operations, which typically have been subject to forfeitures of \$10,000 or more. We also consider that the Station, as a translator, operates on a secondary basis. Taking into consideration these facts and all of the factors required by Section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*, we propose a forfeiture for the full \$3,000 amount for the failure to file a timely renewal application and STA request, but reduce the proposed forfeiture for the unauthorized operation from the \$10,000 base amount to \$4,000. Thus, we propose a forfeiture in the total amount of \$7,000.

10. *License Renewal Application.* In evaluating an application for license renewal, the Commission’s decision is governed by section 309(k) of the Act.²⁹ That section provides that if, upon consideration of the application and pleadings, we find that: (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.³⁰ If, however, the licensee fails to meet that standard, the Commission may deny the application—after notice and opportunity for a hearing under section 309(e) of the Act—or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”³¹

11. We find that Diponti’s apparent violation of section 73.3539 of the Rules and section 301 of the Act do not constitute a “serious violation” warranting designation of the Application for evidentiary hearing. Moreover, we find no evidence of violations that, when considered together, constitute a pattern

²⁶ *Id.*

²⁷ 47 U.S.C. § 503(b)(2)(E); *see also Forfeiture Policy Statement*, 12 FCC Rcd at 17100, para. 27; 47 C.F.R. § 1.80(b)(10).

²⁸ *Southern California*, 6 FCC Rcd at 4387, para. 3.

²⁹ 47 U.S.C. § 309(k).

³⁰ 47 U.S.C. § 309(k)(1).

³¹ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

of abuse.³² Further, based on our review of the Application, we find that the Station served the public interest, convenience, and necessity during the subject license term. We will therefore grant the Application by separate action upon the conclusion of this forfeiture proceeding if there are no issues other than the apparent violations that would preclude grant of the Application.

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED**, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the FCC's rules, that Diponti Communications, LLC is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of seven thousand dollars (\$7,000) for its apparent willful violation of section 73.3539 of the FCC's rules and Section 301 of the Communications Act of 1934, as amended.

13. **IT IS FURTHER ORDERED**, pursuant to section 1.80 of the FCC's Rules, that, within thirty (30) days of the release date of this *NAL*, Diponti Communications, LLC **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

14. Payment of the forfeiture must be made by credit card, ACH (Automated Clearing House) debit from a bank account using the Commission's Fee Filer (the Commission's online payment system),³³ or by wire transfer. The Commission no longer accepts forfeiture payments by check or money order. Below are instructions that payors should follow based on the form of payment selected:³⁴

- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. A completed Form 159 must be faxed to the Federal Communications Commission at 202-418-2843 or e-mailed to RROGWireFaxes@fcc.gov on the same business day the wire transfer is initiated. Failure to provide all required information in Form 159 may result in payment not being recognized as having been received. When completing FCC Form 159, enter the Account Number in block number 23A (call sign/other ID), enter the letters "FORF" in block number 24A (payment type code), and enter in block number 11 the FRN(s) captioned above (Payor FRN).³⁵ For additional detail and wire transfer instructions, go to <https://www.fcc.gov/licensing-databases/fees/wire-transfer>.
- Payment by credit card must be made by using the Commission's Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by credit card, log in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select "Pay bills" on the Fee Filer Menu, and select the bill number associated with the *NAL* Account—the bill number is the *NAL* Account number with the first two digits excluded—and then choose the "Pay by Credit Card" option. Please note that there is a dollar

³² For example, we do not find here that Diponti's Station operation "was conducted in an exceedingly careless, inept and negligent manner and that the licensee is either incapable of correcting or unwilling to correct the operating deficiencies." See *Heart of the Black Hills Stations*, Decision, 32 FCC 2d 196, 198, para. 6 (1971). Nor do we find on the record here that "the number, nature and extent" of the violations indicate that "the licensee cannot be relied upon to operate [the station] in the future in accordance with the requirements of its licenses and the Commission's Rules." *Id.* at 200, para. 11. See also *Center for Study and Application of Black Econ. Dev.*, Hearing Designation Order, 6 FCC Rcd 4622 (1991); *Calvary Educ. Broad. Network, Inc.*, Hearing Designation Order, 7 FCC Rcd 4037 (1992).

³³ Payments made using the Commission's Fee Filer system do not require the submission of an FCC Form 159.

³⁴ For questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone at 1-877-480-3201 (option #6), or by e-mail at ARINQUIRIES@fcc.gov.

³⁵ Instructions for completing the form may be obtained at <https://transition.fcc.gov/Forms/Form159/159.pdf>.

limitation on credit card transactions, which cannot exceed \$24,999.99.

- Payment by ACH must be made by using the Commission's Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by ACH, log in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select "Pay bills" on the Fee Filer Menu and then select the bill number associated to the NAL Account—the bill number is the NAL Account number with the first two digits excluded—and choose the "Pay from Bank Account" option. Please contact the appropriate financial institution to confirm the correct Routing Number and the correct account number from which payment will be made and verify with that financial institution that the designated account has authorization to accept ACH transactions.

15. Any requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director-Financial Operations, 45 L Street, NE, Washington, DC 20554.³⁶ Questions regarding payment procedures should be directed to the Financial Operations Group Help Desk by phone, 1-877-480-3201 (option #6), or by e-mail at ARINQUIRIES@fcc.gov.

16. Any written response seeking reduction or cancellation of the proposed forfeiture must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to sections 1.16 and 1.80(g)(3) of the Commission's Rules.³⁷ The written response must be filed with the Office of the Secretary, Federal Communications Commission, 45 L Street NE, Washington DC 20554, ATTN: Albert Shuldiner, Chief, Audio Division, Media Bureau, and **MUST INCLUDE** the NAL/Acct. No. referenced above. Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.³⁸

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street, NE, Washington, DC 20554.

17. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted. Inability to pay, however, is only one of several factors that the Commission will consider in determining the appropriate forfeiture, and we have discretion to not reduce or cancel the forfeiture if other prongs of 47 U.S.C. § 503(b)(2)(E) support that result.³⁹

³⁶ See 47 CFR § 1.1914.

³⁷ 47 CFR §§ 1.16 and 1.80(g)(3).

³⁸ Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19. See *FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Filing*, Public Notice, 35 FCC Rcd 2788 (2020).

³⁹ See, e.g., *Adrian Abramovich*, Forfeiture Order, 33 FCC Rcd 4663, 4678-79, paras. 44-45 (2018).

18. **IT IS FURTHER ORDERED** that a copy of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Diponti Communications, LLC, 58 High St., Westerly, RI, 02891 and its counsel, Dan J. Alpert, Esq., 2120 N. 21 St., Arlington, VA 22201.

FEDERAL COMMUNICATIONS COMMISSION

Albert Shuldiner
Chief, Audio Division
Media Bureau